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Supreme Court of California.

THE PEOPLE v. TYLER.

Where a statute authorizes but does not compel a party indicted to become a witness in his own behalf, it is improper for the prosecution to comment to the jury on the prisoner's refusal to offer himself as a witness, and the court should when requested charge that no inference was to be drawn against the prisoner from his refusal.

THE opinion of the court was delivered by

SAWYER, C. J. (after disposing of some local points affecting the regularity of the proceedings).—The highly important question in the case arises under the Act of April 2d 1866, entitled "An Act relating to criminal prosecutions," which provides as follows: "Section 1. In the trial of all indictments, complaints, and other proceedings against persons charged with the commission of crimes or offences, the person so charged shall, at his own request, but not otherwise, be deemed a competent witness, the credit to be given to his testimony being left solely to the jury, under the instructions of the court. Section 2. Nothing herein contained shall be construed as compelling any such person to testify:" Stat. 1865–6, p. 865.

At the trial the defendant did not avail himself of the right conferred by this act to offer himself as a witness on his own behalf. During the argument of the case, the District Attorney called the attention of the jury to the fact, that the defendant had not testified in his own behalf, and argued and insisted before said jury that the silence of the defendant was a circumstance strongly indicative of defendant's guilt. Defendant's counsel objected to this course of argument, and requested the court to require the District Attorney to refrain from urging such inference, but the court declined to interfere, and intimated that the law justified the counsel in the course pursued. The District Attorney thereupon continued to urge before the jury, that the silence of the defendant was a circumstance tending strongly to prove his guilt, and the counsel for the prisoner excepted.

At the close of the argument of the case to the jury, the defendant's counsel asked the court to give to the jury the following instruction: "The jury should not draw any inference to the

prejudice of the defendant from the fact that he did not offer himself as a witness in his own behalf. It is optional with a defendant to do so or not, and the law does not intend that the jury should put any construction upon his silence unfavorable to him." The court refused to give the instruction, and defendant excepted. The action of the court in the premises is claimed to be erroneous.

The act under which the question arises, constitutes one of the advances recently made by our legislation in the law of evidence. The principle embraced in the act was first adopted in Maine, we believe, and it has, as yet, so far as we are advised, found a place in the statutes of but few of the states. No decision under similar statutes has been called to our attention, and we are not aware that it has been the subject of judicial construction. The policy of such a statute has been considerably discussed by law writers and others, and, to our minds, the strongest objection that has been urged against it is, that it places a party charged with crime in an embarrassing position; that even when innocent, a party on trial upon a charge for some grave offence may not be in a fit state of mind to testify advantageously to the truth even, and yet, if he should decline to go upon the stand as a witness, the jury would, from this fact, inevitably draw an inference unfavorable to him, and thus he would be compelled, against the humane spirit of the common law, to furnish evidence against himself, negatively at least, by his silence, or take the risk under the excitement incident to his position of doing worse, by going upon the stand and giving positive testimony. The object of the statute is undoubtedly beneficent. It was designed to afford a party charged with crime, and who must necessarily be cognisant of the true state of the case, an opportunity to controvert or explain any fact that may appear to be against him. It was designed to facilitate the attainment of truth, and to advance the ends of justice, by opening the door under certain wise restrictions consistent with the humane policy of the law, not to compel a party to criminate himself, to all the avenues and sources of truth.

We intimated our approbation of modern progress in the law of evidence in some other particulars in the case of *The People* v. *Jones*, 31 Cal. 573, and we are favorably disposed to the act now under consideration. We so intimated in the case of *The People* v. *Farrell*, 31 Cal. 583. But while we are hopeful that future experience will justify the wisdom of this important change in the

law, we cannot deny that it has, as yet, not been in force sufficiently long to develop its practical workings. In order, however, that the results may answer the expectations of those legislators who adopted it, and the ends of truth and justice be promoted, the statute must be examined, construed, and enforced by the courts, in the same liberal and beneficent spirit that prompted its adoption, otherwise it will become an instrument of wrong and injustice, if not of absolute and intolerable oppression; and in this spirit it is our duty to construe and enforce it.

Upon an examination of the act we find that a person charged with an offence, "shall, *at his own request, but not otherwise*, be deemed a competent witness." It is optional with him, then, whether he shall testify or not; and section 2 provides, that "Nothing herein contained shall be construed as compelling any person to testify." This is but a re-enactment by the statute of that provision of our State Constitution, which says, no person "shall be compelled in any criminal case to be a witness against himself:" Art. I., sec. 8.

At the trial, by his plea of not guilty, the party charged denies the charge against him. This is itself a positive act of denial, and puts upon the people the burden of affirmatively proving the offence alleged against him. When he has once raised this issue by his plea of not guilty, the law says he shall thenceforth be deemed innocent till he is proved to be guilty, and both the common law, and the statute, give him the benefit of any reasonable doubt arising on the evidence. Now, if, at the trial, when, for all the purposes of the trial, the burden is on the people to prove the offence, charged by affirmative evidence, and the defendant is entitled to rest upon his plea of not guilty, an inference of guilt could legally be drawn from his declining to go upon the stand as a witness, and again deny the charge against him in the form of testimony, he would practically, if not theoretically, by his act declining to exercise his privilege, furnish evidence of his guilt that might turn the scale, and convict him. In this mode he would indirectly and practically *be deprived of the option* which the law gives him, and of the benefit of the provisions of the law and the Constitution, which say, in substance, that he shall not be compelled to criminate himself. If the inference in question could be legally drawn, the *very act of exercising his option* as to going upon the stand as a witness, *which he is necessarily compelled by*

the adoption of the statute to exercise one way or the other, would be, at least, *to the extent of the weight given by the jury to the inference arising from his declining to testify, a crimination of himself.*

Whatever the ordinary rule of evidence with reference to inferences to be drawn from the failure of parties to produce testimony that must be in their power to give may be, we are satisfied that the defendant, with respect to exercising his privilege under the provisions of the act in question, is entitled to rest in silence and security upon his plea of not guilty, and that no inference of guilt can be properly drawn against him from his declining to avail himself of the privilege conferred upon him to testify on his own behalf; that to permit such an inference, would be, to violate the principles and the spirit of the Constitution and the statute, and defeat, rather than promote, the object designed to be accomplished by the innovation in question.

We are of opinion, therefore, that the court erred in permitting the District Attorney to pursue the line of argument to which objection and exception were taken, and intimating its approbation of the ground taken, and, especially after what had transpired, in refusing the instruction asked on behalf of defendant for the purpose of correcting any erroneous view that might have been impressed on the minds of the jury. We think such instruction proper in all cases where the defendant desires it.

Judgment reversed, and a new trial ordered.

Court of Appeals of Kentucky.

JOHN D. ELLIOTT, APPELLANT, *v.* HENRY NICHOLS, APPELLEE.

A conveyance to husband and wife and their heirs prior to 1850, constituted in Kentucky, as at common law, an estate by entireties, which neither husband nor wife could sever or make liable for debts as against the other.

The statute of 1850, abolishing the right of survivorship and turning the estate into a tenancy in common, is not retrospective.

Semble, the legislature would have had no constitutional power to divest parties of such right of survivorship acquired by a conveyance in entireties before the passage of the statute.

APPEAL from Nelson Circuit Court.